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SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 927

SALVATORE GRANELLO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Petitioner, Salvatore Granello, respectfully prays that this Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit, rendered the 18th day of October, 1968, affirming a determination of the United States District Court for the Southern District of New York (Dimock, J.) denying petitioner's application under Title 28, United States Code, Section 2255, without a hearing. Petitioner is seeking to vacate a conviction, two counts, of wilfully failing to file income tax returns for the years 1956 and 1957.

Opinion Below

The opinion below has not yet been published, except in the New York Law Journal (160 N.Y.L.J., November 7, 1968, No. 91, p. 1) and is reproduced as an appendix to this petition. The Court of Appeals, Second Circuit, affirmed an order of District Judge Edward Dimock, which

denied an application under 28 U.S.C., Section 2255, wherein Granello sought to vacate his convictions for failure to file income tax returns for 1956 and 1957 (see 365 F. 2d 990, 1966). Judge Feinberg concurred in the result only.

Jurisdiction

The jurisdiction of this Court is invoked under Title 28, U.S.C., § 1254(1). The Court of Appeals, Second Circuit, affirmed the order of the United States District Court for the Southern District of New York which had denied the relief requested without a hearing on October 18, 1968.

Questions Presented

1. Was it error as a matter of law or at least a gross abuse of discretion for the District Court and the Court of Appeals to deny an evidentiary hearing under 28 U.S.C. § 2255 in view of the fact that three Justices of this Court had voted in favor of granting certiorari upon the petition originally filed in connection with an attempt to seek review of the judgment of conviction itself? (386 U. S. 1019, rehearing denied, 387 U. S. 959, 1967.)

2. Whether Granello is entitled to a vacation of his judgments of conviction because of the admission by the government that they have destroyed all of the innumerable tapes of recorded conversations obtained by trespass during surveillance over about 13 months time of the co-defendant, George Levine?

(a) While the government had made available portions of incomplete transcripts of these conversations, some of which admittedly referred to petitioner Granello, complete transcripts were never made and those that were given to the government were censored and spoliated before being turned over to the petitioner.

3. Whether Granello was prejudiced and entitled to a hearing in view of the confession by the government that an inventory of the important Birrell records had existed since prior to the initial prosecution of Granello, but that Granello and his counsel were not made aware of this fact despite inquiries concerning this matter during the trial?

(a) The inventory consisted of over 300 pages and might well have been vital to the defense of the case. Only a self-serving declaration by the government that nothing helpful to the defense existed was articulated in defense of the government's actions. Yet, in the opinion of Judge Dimock at the trial denying a hearing on a suppression motion, it was conceded that without the Birrell records no conviction could have occurred.

4. Whether the government was guilty of deliberate spoliation of the tapes of the Levine conversations by its unexplained acknowledgment that the tapes had been completely destroyed, apparently before the Appellate process from the judgment of conviction had even been exhausted? The unsubstantiated declaration by the United States Court of Appeals that the tapes were erased in the course of normal business, is completely uncorroborated by anything whatsoever in the record, and evidences a complete disregard of the facts as adduced at the proceedings wherein the hearing was sought.

5. Whether in view of the decisions of this Court an evidentiary hearing and production of all of the transcripts of electronic surveillance is required to adequately protect the petitioner's rights? This raises the corollary question as to whether an in camera review by the Trial Judge satisfies due process of law, or whether the petitioner himself must review the information and transcripts to determine whether he has been prejudiced.

Constitutional and Statutory Provisions Involved

Fifth Amendment;
28 U.S.C. § 2255;
26 U.S.C. § 7201.

Statement of the Case

The petitioner, Salvatore Granello, was originally indicted along with one, George Levine, charged with a conspiracy along with an attorney, Lowell Birrell, to violate 26 U.S.C. § 7203. A three count indictment charged the defendants, Granello and Levine, with attempting to evade income taxes for the year 1957 (26 U.S.C. § 7201) and a conspiracy to defraud the United States in collecting taxes for 1957 by concealing their sources of income and the nature of their businesses. (Birrell was named a co-conspirator, but not a co-defendant in the first trial which ended in a mistrial by reason of a hung jury.)

A second trial was ordered. Before that however, Granello timely moved for a severance which was denied.

At the second trial, as in the first, a motion to suppress evidence seized from Birrell was denied without a hearing.

It was conceded by the government that the records seized from Lowell Birrell were a *sine qua non* to the conviction of Granello and Levine (*U. S.* v. *Granello,* 243 Fed. Supp. 325, Southern Dist. N. Y. 1965).

Judge Inzer Wyatt previously ruled that the seizure of the Birrell records had been unconstitutional and ordered their return and suppression. (*U. S.* v. *Birrell,* 242 F. Supp. 191, S.D.N.Y. 1965.)

While the United States Court of Appeals affirmed the conviction of the two misdemeanors following the second trial, namely failing to file income taxes for 1956 and 1957, the jury having hung again on the other charges, this

Court was advised by the Solicitor General that there had been a microphone placed by trespass inside of premises over which co-defendant Levine had a proprietary interest.

Three Justices of this Court dissented in favor of granting certiorari—a fourth Justice having disqualified himself. (*Granello* v. *U. S.*, 386 U. S. 1019.)

The Facts Considered

It is extremely important for this Court to note that the original determination of Judge Dimock denying an evidentiary hearing on a motion to suppress evidence during trial, nevertheless conceded that the Birrell records were absolutely indispensible to the conviction of the defendants. The defendants during the trial had sought to examine certain of the Birrell records and were given permission by the Judge to do so. There were millions of documents, however, in a huge room, which consisted of unopened file cabinets, boxes and what not. The government, although it had in its possession a 300 some odd page inventory of those records, never disclosed this fact to Granello or Levine and only after counsel confronted with the government at this proceeding was it ever admitted that these inventories existed at the time of the first and second trials.

In the District Court the government conceded that it had many tapes of conversations obtained by trespassory eavesdropping of George Levine, the co-defendant. It was undenied that some of these tapes referred to Salvatore Granello.

The government stated that nothing in those tapes concerned the New York tax case. Transcripts were not complete and in many cases were merely conclusions of the person making the transcript. The crucial factor to bear in mind, however, is that the government declared that every single one of these tapes had been destroyed apparently prior to the exhaustion of the Appellate process.

No explanation whatsoever was given in the record as to why these tapes were destroyed. The completely unfounded declaration by the Court of Appeals that the tapes were erased in the regular course of business is utterly unsubstantiated in the record. It is inferable, even more so, that the tapes were destroyed because the government would not permit the defendant to hear them because they would show a clear violation of his rights. It is completely unusual for the government to destroy tapes before the Appellate process has ended.

The transcripts were only partially turned over to the petitioner, Granello. Even these partial transcripts indicate that in many cases the government stated that certain conversations were unrecorded or merely gave a conclusory summary of what was said.

It was part of the request of the petitioner's counsel that the agents or employees of the government who made the transcripts or took the recordings should be made available for questioning, since they might very well recollect something about the New York tax case which because of the nature of their particular investigation, they might not have recorded. It is entirely possible, however, that an agent could well have called this to the attention of other agents. The District Court and the Court of Appeals precluded such an exploration.

This case has been marked by a singular series of circumstances which have frustrated every attempt on the part of petitioner to obtain a hearing with respect to clear violations of the constitution by law enforcement officials. In the trial itself, the District Court denied a hearing on a suppression motion, despite the fact that the records, upon which the conviction herein was based, had been declared to be tainted in view of the fact that District Judge Wyatt had declared that they had been seized unlawfully from Lowell Birrell.

As this Court will no doubt recall from its initial review of the petition for certiorari from the judgment of conviction, there had been demands made by defense counsel at the trial, Mr. Germaise, who clearly wanted to know whether or not an inventory of the voluminous Birrell records existed. The trial prosecutor, obviously knowing, or at least charged with the knowledge that a 300 some odd page inventory did exist at that time, completely failed and omitted to bring this to the attention of either the defense counsel or the Court. This was a gross violation of due process of law (*Brady* v. *Maryland*, 373 U. S. 83).

This Court on the initial petition for certiorari from the judgment of conviction, received a confession from the Solicitor General of the United States that a microphone had been placed by trespass in premises over which co-defendant Levine had a proprietary interest. This eavesdrop, as I understand it, existed for about 13 months during the period of time immediately before this case came to trial. There was no doubt that petitioner's name had been mentioned in those tapes, since the transcripts which now exist so reveal. The transcripts were never completely turned over to the defense counsel, but only censored and redacted portions thereof were given. The Trial Judge who presided at the motion asking for a hearing under Section 2255 presumably reviewed the entire transcripts and he did not believe that anything pertained to the defendant's trial or the petitioner herein, at least so far as the tax case herein involved is concerned.

It is submitted that that is a determination which can only be made by the defendant and the petitioner himself. This Court, three Justices dissenting, denied certiorari. One Justice disqualified himself. The dissent indicated that a hearing was probably in order. At the request for a hearing, again the petitioner herein was frustrated by technical rulings of the Court.

The United States attorney, without any apparent embarrassment, blatantly revealed that all the tapes of the months and months of eavesdropping had been totally destroyed and were unavailable. No explanation whatsoever was given by the government as to why this was done. The District Court and the Court of Appeals, seeking to find some excuse for this incredible circumstance, has concocted an explanation that the tapes may have been erased in the regular course of business. There is no substantiation for this in the record and frankly it is incredible that such excuses should be tolerated. Also, in the District Court at the time a hearing was requested, the government acknowledged that there was indeed a 365 some odd page inventory, but again the defense was not permitted to review this in view of the fact that Granello was unable to establish that anything helpful to him was contained in the voluminous records. How in the world he could find out what was contained in them in the first place, so as to know whether or not it would be helpful, was not explained. It seems that extra sensory perception is one of the attributes which is necessary in order to succeed in obtaining a hearing in such a case.

The letter of Lowell Birrell has now been substantiated by an affidavit of Lowell Birrell, which unfortunately was received after the District Court proceeding had concluded. The United States Court of Appeals refused to consider the affidavit. The letter, however, in itself, bears strong indication that an attorney-client privilege may have been violated, and this, too, mandated a hearing.

Notwithstanding all the strong indications of official wrongdoing, both Courts below have been very glib in finding ways to deny it.

POINT I

A hearing should be granted and bail should be given in a reasonable amount pending the outcome of that hearing.

The official wrongdoing in this case should shock the conscience of this Court. Not only was there a trespassory eavesdrop for about 13 months on the co-defendant's premises, but the government knowingly destroyed the tapes thereof and no verbatim transcripts are available. In addition, the government knowingly suppressed the fact that a 300 some odd page inventory of the vital Birrell records existed at the time of trial. Moreover, the courts below have refused to permit an interview of the agents who conducted the surveillance.

The facts, as considered above, clearly reveal a shocking denial of due process of law and use of illegal evidence against the defendants herein.

The original brief on the petition for certiorari is incorporated by reference herein. It is unnecessary to go into the many cases which indicate that the government should never be in the position of denying a person accused of crime due process of law, or even denying possible fairness in a trial.

Yet, the government admittedly used illegally seized evidence against the petitioner herein at his trial, but because of the technicality that he allegedly lacked "standing" he could not object. Admittedly, the government seized hundreds of thousands of documents from Lowell Birrell who has admitted that he was the former attorney of the petitioner herein. Lowell Birrell has indicated that there may have been documents which would have exculpated the petitioner herein.

The District Court at the original trial, without contradiction by the government, conceded that the Birrell records

were essential to the conviction of the petitioner. Yet absolutely no meaningful inspection of those records was ever given and the inventory which the government always had in its possession was suppressed, and not even made known. Finally, to add insult to injury, the government now admits that it has destroyed 13 months of electronic tapes which existed of conversations involving the co-defendant, Levine, during a period which it seems would necessarily have included preparation for this trial.

Affidavits were received by the District Court from defense counsel, Germaise, and from co-defendant Levine and two attorneys in Florida, that pertinent material relating to Granello were in the conversations that Levine had during the surveillance. The maxim "contra spoliatorem omnia praesumuntur" requires that it be presumed that the evidence which is destroyed by one litigant would have been unfavorable to the spoliator (1 Smith, leading cases 315).

Since *Katz* v. *United States,* 389 U. S. 347 and *Berger* v. *New York,* 388 U. S. 41, it has been clear that a question of "standing" should not defeat a defendant's rights where a clear violation of privacy has occurred. The petitioner certainly never anticipated or expected that documents which would incriminate him would ever be taken from his former attorney, Lowell Birrell. There can be no doubt that his privacy and right under the Fourth and Fifth Amendments, to say nothing of the Sixth Amendment were violated.

The petitioner, before the District Court in this proceeding, requested the entire transcripts so far as they existed of the unlawful tape recordings which were made of his co-defendant's conversations in which his name admittedly had been mentioned. The government gave the Court the entire transcripts so far as they existed,

and then gave a completely censored and edited version of those transcripts to defense counsel.

The dissent of three Justices of this Court indicated that the government had been guilty of "trespassory espionage". Yet the government's self-serving declaration that nothing helpful or important to the defense was contained in either the tapes or in the suppressed inventory was sufficient to satisfy the Court of its being true.

This Court is rhetorically asked, why should the word of an adversary, in this case, the United States Attorney, be taken as true, when the subordinates of that adversary have violated the law, invaded the privacy of the co-defendant and suppressed evidence? Why must we assume that the government suddenly becomes unimpeachable and completely honest, when in the past they have displayed a reckless disregard for the rights of this defendant?

No aspersion is being cast upon the United States Attorney, personally, but at least the agents who conducted these unlawful acts should have been produced for the purpose of examination. Perhaps they would have recollected something very important.

A perusal of the tapes in this case reveal that only in part are they literal or verbatim transcripts. In many other instances they are conclusions of the person making the transcript. In some cases the person listening to the tapes turned them off and the remark "unrecorded" is inserted. In other cases, the remark "inaudible" is inserted.

The original tapes were the best evidence. For some reason they were destroyed apparently before the Appellate process was exhausted. There is very strong reason to suspect that this is not merely some inadvertent or casual determination to reuse the tapes.

On the contrary, since the petitioner herein, Salvatore Granello, is apparently regarded as an important case,

it seems hardly likely that this material would have been destroyed.

This Court has indicated in a number of decisions that tapes should be turned over to defendants where they have any possibility of relating to the crimes involved. (*Alderman* v. *United States,* argued 10/68 Term and still under consideration at this time.)

Lowell Birrell has conceded in a letter and now in an affidavit, which the Court of Appeals would not receive, that he was counsel for the petitioner herein during a time that was relevant to the indictment. Birrell also indicated that he believed material was in the records which was seized from him unlawfully that would have been exculpatory to the defendant at his trial.

The government admitted at the proceedings in the District Court herein that it had not made known the existence of a 300 some odd page inventory of the Birrell records, but again made the self-serving declaration that there was nothing helpful to the petitioner in the hundreds of thousands of documents contained therein.

The United States District Judge even refused to permit a review of the inventory.

A

The government has not acted fairly and has in truth and in fact suppresed or destroyed material that might well have been crucial to the defense.

The government admitted that they did have the inventory at the time of the trial. They do not deny that it was not turned over or even disclosed (see minutes of 12/11/67, pp. 23, 72a).

In addition the government unabashedly and blatantly conceded that the original tapes of the conversations concerning which the instant motion is addressed, were *destroyed* (*ibid.* 40-48) (82, 83a).

"Mr. Anolik: Your Honor, may I state that Judge Choate of the Florida District Court directed that the actual tapes be turned over, and I also point out in the Schipani case, in the United States Supreme Court, even a collateral reference was held material, and I think to that extent we would be deprived of a full review. We would be getting an attenuated, very narrow view of what these records contain, your Honor —because I understand, from what I am told by Mr. Levine, whose counsel, I believe, saw some of these logs in Florida—isn't that right, Mr. Mitchell?

Mr. Mitchell: That is right.

Mr. Anolik: That there are several places where they say 'Not recorded' or 'Inaudible' or things of that sort, and I certainly think it would be germane and obvious when a respected coordinate judge, Judge Choate in Florida, held that the *actual tapes should be made available.*

The Court: Mr. Mitchell, is there any difficulty about making available the actual tapes of the matter which you now say you are willing to turn over in transcript form?

Mr. Mitchell: My understanding is that *the tapes are no longer in existence.*

The Court: That settles that."

POINT II

The government admittedly had a 300-odd page inventory of the illegally seized Birrell records at the time of the trial. Although it is clear that the records were so voluminous that without an inventory a search thereof was a meaningless exercise in futility, the government never disclosed the inventory even to this date. The Court denied an inspection even of that.

At the trial, counsel had sought the right to look through seized records of Lowell Birrell, whom counsel asserted

had once been attorney for Granello and who admitted the same in a letter annexed in the papers heretofore filed in this case. The government never produced an inventory and indicated that none was available.

Now it is learned that since 1961, before the trial, a 300-odd page inventory has existed and was in possession of the government. The record in *United States* v. *Birrell,* 61 Cr. 692, S.D.N.Y. indicates that between one and two *million* documents were seized from Birrell (p. 97 of minutes of 3/14/67, 61 Cr. 692).

The colloquy in *United States* v. *Birrell, supra,* on April 27, 1967 (pp. 186, 187) revealed the existence of the inventory which was suppressed and which the Court below also suppressed. (See Exhibit II annexed.)

It should also be noted that the *search warrant* used to seize the Birrell records specifically included the Pacheco Mining Co. records. Both Granello and Levine were officers of that company and thus were directly prejudiced by the seizure. Certainly, they should have been permitted to see the inventory (see February 7 1967 affidavit of Assistant U. S. Attorney Liman, Exhibit A, in connection with *United States* v. *Birrell,* 61 Cr. 692).

A letter of Lowell Birrell which was submitted to the Supreme Court of the United States indicates that the records seized from him included exculpatory material which would have conclusively established their innocence (see Exhibit I annexed).

In the trial record of the case at bar, Mr. Irwin Klein, attorney for Granello told the Court as an officer of the Court (S. M. 3/25/65, pp. 29, 30):

> ". . . Birrell was attorney for defendants . . . I say that he [Birrell] was our attorney; the papers were confidential and privileged and certainly, the Fifth Amendment precludes their use."

Brady v. *Maryland*, 373 U. S. 83, and fundamental fairness required the disclosure of the inventory and indeed of the existence of the eavesdrops. This was not done. The judgment should be vacated, or at least a hearing should be held where witnesses may be called and examined.

In analysis it is respectfully submitted that this Court should grant certiorari and direct a hearing be given under Section 2255 of Title 18 of the United States Code.

In addition, it is respectfully requested that this Court award bail to the petitioner since he only has a few months left on his sentence and he will have served the entire sentence if that relief, namely bail, is not given.

CONCLUSION

The order of the United States Court of Appeals affirming the District Court's denial of a hearing under 28 U.S.C. 2255 should be reversed and the case should be reminded for a hearing, or in the alternative, the judgment of conviction should be vacated. In any event bail pending certiorari should be granted at once.

Respectfully submitted,

IRVING ANOLIK and MICHAEL P. DIRENZO,
Attorneys for Petitioner.

IRVING ANOLIK,
Of Counsel.

Exhibit I.

New York, New York
May 8, 1967

Irving Anolik, Counselor at Law
6 East 45th St.
New York, N. Y. 10017

Dear Mr. Anolik:

Tnis letter is in reply to your letter of April 18, 1967 to Mr. William J. Brennan, III, a copy of which was sent to me.

Referring to your specific queries:

1. I was an attorney at law and senior partner of the firm of Birrell and Larson. The firm of Birrell & Larson represented Salvatore Granello and George Levine in various matters during the period from 1954 through 1957.
2. The firm of Birrell & Larson received many confidential papers and documents in their capacity as attorney for Messrs. Granello and Levine.
3. The complete files and records of Birrell & Larson were illegally seized by the United States Government. They have been represented as being intact in the possession of the United States Attorney for the Southern District of New York.
4. If and when any of these papers and documents of Messrs. Granello and Levine are returned to me, I will be glad to return them.
5. On November 24, 1965, I wrote to Mr. Irving Klein about this matter; I described in a general way some of the records and I enclosed a copy of the minutes of a directors meeting of Lomega Gold Mines, Ltd. (See exchange of correspondence with Mr. Klein enclosed.) I told Mr. Charles G. Stillman, the Assistant in charge, prior to the trial of the cases against your clients, that there were definitive agreements and books and records to show conclusively

that I never purchased for my individual or personal account any Pacheco stock from Messrs. Granello and Levine; that Lomega Gold Mines Ltd. of Canada had acquired the assets of the Pacheco Petroleum Company of Cuba. I also told Mr. Stillman that the books of account and general ledger of Birrell & Larson would reflect the true transaction which took place. The meeting with Mr. Stillman was at the United States Courthouse and there were present two IRS agents, Passarelli and Ferisi, my lawyer, Mr. William B. Pennell and I think also my other lawyer, Mr. Menahem Stim.

Very truly yours,

/s/ Lowell M. Birrell
Lowell M. Birrell

Exhibit II.

Excerpts from minutes of proceedings before Herlands, D.J. in *United States* v. *Birrell,* 61 Cr. 692 (S.D.N.Y.) on April 27, 1967:

Pp. 186, 187:

> "The Court: Mr. Spieler, I have received from Daniel H. Greenberg a letter dated April 26, 1967, entitled 'Re: Records seized from Lowell M. Birrell.' "

The defendants referred to are Gerardo A. Re and Gerard F. Re.

Mr. Greenberg writes for the purpose of obtaining authorization to have a certain inventory of records made available to him for purposes spelled out in the letter.

Pp. 191-2:

> "Mr. Greenberg: I want to supplement my petition for certiorari with this inventory. I am advised that Mr. Brennan, one of the Court-appointed attorneys for Mr. Birrell, was handed a copy of this 300-odd page inventory of the Birrell records, and he has indicated that he received it under some sort of an informal interdiction from Government counsel that *he will not make it available to anyone else.*
>
> I think *there was a limitation as to showing it even to his client at this point.* [Emphasis supplied]
>
> Mr. Hammerman: That was the original request, your Honor. And then before your Honor there was the refining of that to state that neither the client nor Mr. Brennan would furnish that inventory or show that inventory to anyone else, for the very good reason that until a decision is made by your Honor with regard to whether or not an inventory is to be provided, there would be no reason to furnish that to anybody.

Exhibit II.

Mr. Greenberg: Well, I will say parenthetically—

The Court: I will just read from Page 89 of the official reporter's minutes in the Birrell pretrial proceedings on February 15, 1967.

Mr. Hammerman, the Assistant United States attorney, said:

'Your Honor, just for the record, I have furnished Mr. Brennan with a copy of the Government's inventory and I have requested Mr. Brennan, which he has agreed to, (1) not to make a copy of that until this question is resolved, and (2) not to disclose or show it to anybody, and that he is to keep it. . . .' "

P. 193:

"The upshot was that it was agreed that it was satisfactory if Mr. Birrell, who was the defendant, studied the inventory, and went over it with counsel, and gave Mr. Brennan, his lawyer, the benefit of his observations, comments, et cetera. That appears at Page 91.

And that is the way it was left.' "

Minutes of Colloquy of December 11, 1967.

Before: Hon. Edward J. Dimock, D.J.

New York, December 11, 1967;
2:15 o'clock p.m.

Appearances:

Robert M. Morgenthau, Esq., United States Attorney, for the Government; Michael Mitchell, Esq., Assistant U. S. Attorney, of Counsel.

Michael Direnzo, Esq., and Irving Anolik, Esq., Attorneys for Defendants.

Also Present: Irwin Germaise, Esq.

The Clerk: United States of America vs. Salvatore Granelli, et al. Both sides ready?

Mr. Mitchell: The government is ready.

Mr. Anolik: Yes, your Honor, we are ready.

If your Honor please, the last time we were here I had suggested that we reserve the right to make additional arguments with reference to the inventory, if necessary, after examining the trial record.

In the interim I have been in touch with Mr. Germaise, who was trial counsel in that case. He is present in court today, and he has examined the record, and I would like to supplement, or I should say, I would like him to supplement some of the arguments that we made because he can refer to page numbers in the trial record that I think would buttress some of the arguments that were made with reference to the amount of availability of the inventory at the time that it was demanded.

May he, your Honor?

The Court: Yes, I will be glad to have him.

Mr. Anolik: He is a member of the bar of this court, your Honor.

Mr. Germaise: Thank you, your Honor—

The Court: Let me see if I can perhaps save some time by telling you my impressions after having examined the record. This does not seem to me to be a case where we are having a struggle over attorney's work product. What happened was that Mr. Germaise wanted two exhibits or classes of exhibits: a ledger and checkbooks, and he was shown into a room where a lot of books and papers were stored, and it just seemed to be impossible to go through these things, to hunt for these two needles in a great big haystack, and it was suggested then that this invenotry would be of assistance to find these things. That was the only purpose of having the inventory.

I do not see why we cannot just continue this as an application for examination of the ledger and the checkbooks, if they can be found, and I do not see why we cannot use the inventory just as an assist to locate them, if you think they can be located. It doesn't seem to me to be a matter of enormous moment, that there happens to be an inventory which will assist the government in helping Mr. Germaise to find these papers, and my suggestion would be that the government do assist by examining the inventory as to whether there is anything there, with respect to the checkbooks or ledgers, and if the government reports that it cannot find anything there, it can be submitted to me and I will see if I find anything there, and that will be the end of that, and that will be marked for identification.

Do you want to shoot at that time, Mr. Germaise?

Mr. Germaise: Yes, your Honor.

May it please the Court, I think it is a little deeper than that. In addition to the ledger page, I believe—

Mr. Mitchell: Wait. Could we make clear what ledger page, Mr. Germaise?

Mr. Germaise: Yes. We asked for the Birrell & Larson ledgers.

Mr. Mitchell: All right that is one—Birrell & Larson ledgers.

Mr. Germaise: Of all Birrell & Larson companies.

We asked for bank reconciliations. I will show you the witness, where we asked for these, made these requests—for instance, on page 1172 of the record we asked Mr. DeRisi upon cross-examination—if your Honor will recall, he was the bookkeeper-accountant for all of the Birrell firms—and I asked Mr. DeRisi:

"Q. Where is the bank reconciliation? A. I don't know, sir.

"Q. When is the last time you saw that document? A. I don't know, sir.

"Q. Well, it was kept with the stub books, wasn't it? A. Not necessarily, no, sir.

"Q. Where did you keep it? A. It was kept in the file cabinet.

"Q. The ones that were in your home? A. Yes, sir.

"Q. And the ones that were subsequently taken from the Dunn Farm in Bucks County? A. Yes, sir.

"Q. And the ones that were subsequently seized? A. Yes, sir.

"Q. And brought to this courthouse? A. Yes.

"Q. But you don't have them here today? A. I don't have them, no, sir."

Mr. Mitchell: All right, that is page 1172 of the record?

Mr. Germaise: Yes.

Mr. Mitchell: And what is that now?

Mr. Germaise: That is the bank reconciliation.

Mr. Mitchell: Bank—

Mr. Germaise: Reconciliation.

Mr. Mitchell: Bank reconciliation statements?

Mr. Germaise: Yes.

Mr. Mitchell: I don't mean to interrupt, Judge Dimock, but do you mind if I try to clarify it in a little more detail?

The Court: Go ahead.

Mr. Mitchell: The bank reconciliation statements—what does that relate to, Mr. Germaise? To what?

Mr. Germaise: They were the reconciliations of the checks that were presented in evidence and had to do with —that corresponded to the checkbooks.

Mr. Mitchell: In other words, bank reconciliation statements, let us say, relating to all accounts from which the checks were introduced in evidence?

Mr. Germaise: Yes.

May it please your Honor, what I am trying to say is that there were many, many other documents which we wanted to see.

The Court: You may have wanted to see them, but that wasn't the issue. We are not going to retry the case.

Mr. Germaise: No, I understand that, sir, but what we wanted, when I went into that room at the luncheon recess on April 19, 1965, at your Honor's direction, I specifically asked for an inventory of what was in that room. I was told there wasn't any. I wanted to see the documents subsequent to Exhibit 111—I wanted to see the Whitney receipts. There were many things that came up in the trial that I wanted to see that I thought would help our case. I was told there was no inventory and reported back to your Honor that it was impossible to go through these thousands of files, many of which were in locked cabinets or tied in rope cabinets or chained without an inventory. I was told there was no inventory, when in fact there was an inventory for four years and I was not permitted to cull from those files the papers and documents which I believe would have been necessary to help my client.

In the meantime, the government had the benefit of this inventory for four years, and they amassed the docu-

mentary evidence. I wanted to find the balance of the documents which truly explained transactions concerning which the government produced half of the documents, and I was told that there was no inventory. Your Honor asked if there was an inventory and was told there was not any.

Mr. Mitchell: That is not true from the record, your Honor.

Mr. Germaise: Well, let me find it for you—page 1099, Mr. Stillman speaking: "I imagine that somebody would have knowledge of that but to my knowledge there is no specific log maintained, your Honor, of each document coming in and out."

The first day they came in, that log was prepared.

Mr. Mitchell: That again is wrong.

Mr. Germaise: Let me finish. On page 1101—well, they were prepared shortly after, but there was a log in existence. On page 1101, your Honor speaking to me, says: "That was removed. What we are working on is to try to get a list of those that were there. As I understand it, your statement is that there never was a list made of the ones there. It is only the ones that go in and out that are logged?"

And I answered your Honor and say: "That is correct, sir."

And Mr. Stillman sat by and did not say a word to correct your Honor or myself, that there actually was a log of those that were there, and not only those that were taken in and out. A log was prepared by the office of the United States Attorney, and obviously was utilized by Mr. Stillman in culling from the files which he wanted and presented at the case, and that is what we did throughout.

Then of course during the luncheon recess I asked Mr. Stillman how in the world could he pick out what he wanted from this cavern of files and he said, "There is no way

possible but hit-and-miss, and going through the files and find what you want," and he said, "Go ahead and find it," which I reported back to your Honor after the luncheon recess was fruitless because it was just impossible to do it. But your Honor specifically asked if there was an inventory of all the doucments that were in that room as contrasted to a log of those documents taken in and out, and Mr. Stillman sat by and did not say a word as to the existence of such a log—and that appears on page 1101 of the record, your Honor.

The Court: Mr. Germaise—

Mr. Germaise: Yes?

The Court: —where did you state what you wanted to say before the examination of the locked room?

Mr. Germaise: Well, initially, your Honor, it was stated on page 3 in the opening motions, after the jury was impaneled.

The Court: No, I mean at the time when we had this—

Mr. Germaise: Throughout the trial, your Honor.

The Court: No, I meant when we were discussing what you were looking for in the locked room.

Mr. Germaise: Well, what brought it up—

The Court: I have page 1103—you wanted to see a Birrell & Larson ledger.

Mr. Germaise: Yes, your Honor. What brought it up was the questioning of Mr. DeRisi concerning the ledger pages where I say at page 1097:

"Q. We don't have those ledger pages here today, do we, sir? A. I guess we do not.

"Q. When is the last time you saw them, Mr. DeRisi? A. I don't remember, sir.

"Q. You maintained them? A. Yes, I did.

"Q. They were kept with these other books that we do have with us, weren't they? A. Yes, sir, all the books were kept together.

"Q. Together? A. Yes.

"Mr. Germaise: I would like to call upon the United States Attorney at this time to produce the Birrell & Larson ledger book, if such is here in this building."

Then Mr. Stillman says:

"Perhaps Mr. Germaise didn't hear me before, your Honor. I stated that we don't have it and to my knowledge and understanding we never did have it. If he would like me to take the stand and testify to that under oath, I would be happy to do it."

And then I state: "I would like your Honor to take judicial notice that Judge Palmieri of this court issued two orders directing the office of the United States Attorney to return to the custody of one person in one place various documents of Lowell Birrell files which were taken from those cabinets of the seized documents.

"No record was made of those documents."—

This was a point, your Honor, where a record was made and Mr. Stillman again sat by and said nothing to the contrary.

"They were all directed to be put back and logged, and I would like your Honor—I request that the office of the United States Attorney be directed to furnish us a view of the log which Judge Palmieri's custodian has kept of the documents that are in this building and specifically with respect to the Birrell & Larson ledger.

"Mr. Stillman: I take it that what he is saying is that he doesnt' believe me, your Honor.

"Mr. Germaise: That is not what I am saying. You may be uninformed.

"Mr. Stillman: The best I can do, your Honor, is to testify to the fact that to my knowledge and belief we never had it.

"I can point out to you that there is no log maintained. There is a log maintained of people who go into and out of the room in which the files are maintained."

Now I maintain, your Honor, that that is a complete misrepresentation.

"There are receipts any place where a record was taken from these numerous files, there is a receipt present there.

"I personally am not in charge of that. Mr. Peter Morrison of my office was in charge of that. He has left the office.

"I imagine that somebody would have knowledge of that but to my knowledge there is no specific log maintained, your Honor, of each document coming in and out."

So we go.

But he said, "I can point out to you that there is no log maintained. There is a log maintained of people who go into and out of the room in which the files are maintained."

I respectfully submit to your Honor that there was a log maintained, it was maintained, it was maintained by the United States Attorney. Mr. Stillman utilized that log and he did not tell us about it, and it was our right to use the log, and the first time we asked for it was immediately after the impaneling of the jury, on page 3 of the record, where we asked for all the records.

Mr. Mitchell: Could I see that?

Mr. Germaise: Certainly (handing).

The Court: I find a place on page 1103 where you want the Birrell & Larson ledgers.

Mr. Germaise: Yes.

The Court: I believe there was some other place where you said you wanted checkbooks—I can't find it.

Mr. Germaise: Throughout the case, your Honor, we asked for the Whitney receipts.

The Court: I am not going to act on requests that you made throughout the case; I am confining myself to this specific incident which caused so much discussion about an inventory in the government lawyer's work product.

Mr. Germaise: May I respectfully call your Honor's attention to page 6 of the record?

The Court: Wait until I have exhausted this.

Mr. Germaise: Yes.

The Court: (After examining) On page 1106—

Mr. Germaise: Yes, sir.

The Court: —and I will say I did not find the book I was looking for, nor was I able to look for these other checkbooks that I was going to ask the witness about.

Mr. Germaise: On the very next page, your Honor, the Court says, "There is no inventory?"—in a question.

The Court: Yes. That is the thing I am trying to avoid discussing because it seems to me that the inventory is of such little moment here when what we are talking about are the checkbooks and the Larson ledgers, if the inventory is of any help to find out.

Mr. Mitchell: I think the checkbooks Mr. Germaise will agree with me are pre-'55.

Mr. Germaise: Yes.

Mr. Mitchell: If you will recall, your Honor, the defense sought to establish that there were pre-'55 dealings between Granello and Levine and Birrell, and they wanted to argue that there were prior billings and prior payments, and therefore these documents were simply a continuation—was that your argument at the trial?

Mr. Germaise: Yes. In fact, one checkbook of that type was presented by the testimony of one of the Internal Revenue agents, which is the checkbook that did not go into the juryroom with all the other exhibits—that is the one exhibit that was omitted from the jury.

May I respectfully state, your Honor, that from the beginning of the trial, the first day, the minute the jury was impaneled we asked for all the Birrell & Larson records and we specifically state that we had information that there were documents in the possession of the United States Attorney which would exonerate the defendants. We did not specify which ones we have.

It starts on page 3 and it continued, and Mr. Stillman did not say in answer to this motion for discovery—on page 6 Mr. Stillman states: "If Mr. Klein would like to tell us what documents we have, because he says we know and have been informed of the existence of such documents, if he will tell it to us, I will be happy to bring them into this courtroom myself and make them available to him."

Well, I maintain, your Honor, that that is far short of the duty imposed on the office of the United States Attorney, especially when he had an inventory that could have told us exactly what documents were wanted and where they were, and throughout the trial he completely ignored the fact that there was such an inventory every single time it was brought up, and it was brought up throughout the trial.

We spent a full day on this the first day of the trial, asking for the Birrell & Larson records, all the Lowell Birrell documents, and we knew there were documents there which would exonerate the defendants, and Mr. Stillman told us if we could tell him what they were—if he showed us an inventory we could have told it to him in two minutes.

The Court: Well, you are not entitled to a general discovery.

Mr. Germaise: You see, we state, your Honor, on page 7: "because the others are documents that the defendants of necessity must have available to themselves in order to show the entire transaction to the jury and to your Honor and to make the entire transaction known."

That is when we asked for an inspection and discovery of the Lowell Birrell records. If we had the inventory we could have pinpointed what documents we wanted in a very short time, and it would have been a far different trial.

The Court: I take it that my suggestion is not satisfactory to you, that the inventory may be examined only for the purpose of locating, if possible, the ledgers and checkbooks?

Mr. Germaise: I think, your Honor, that the important —the depth of this goes far beyond. I think, No. 1, there is the question of Brady v. Maryland; and, No. 2, there is an overt misrepresentation to this Court during the trial that something did not exist which in fact did exist and would have been of material aid in the defense.

The Court: I understand you are not satisfied with the suggestion I make.

Mr. Anolik: Your Honor, may I interpose for one moment?

The Court: Yes.

Mr. Anolik: We would naturally be satisfied, your Honor, to a limited extent, whatever your Honor would give us that we do not have now, obviously we would not want to reject. We are merely saying—

The Court: Oh, I wasn't saying this in settlement!

Mr. Anolik: I am sorry.

The Court: No, I just wondered. I think I should go on—you are still pressing for an examination of the whole inventory for the purpose of finding other documents than the ones which were discussed at the time the matter came up.

Mr. Anolik: That would be correct, your Honor.

Mr. Mitchell: I think your Honor made clear the last time we were here that the only good basis of defense for the inventory was that which related to the discussion in the record, and that was what your Honor said—let Mr. Germaise go up there because he was looking for these particular documents and that would be the only reason that you would let him or let the defense examine the whole inventory. We have focused on the particular documents

which permitted your Honor allowing Mr. Germaise to go up there, and the government would say that it should be limited to that, because otherwise most of Mr. Germaise's argument is a relitigation of everything that took place at the trial, to the motion papers and the Court of Appeals have already passed on this, and I say because of your Honor's rulings and denying the motion as to whether Birrell was their attorney and still adhering to the rules made by the Circuit Court of Appeals that they had no interest in the Birrell files, that it should be focused on that. A colloquy took place at page 1100 of the record, and that is all that they are entitled to, and of course the government still makes this argument that they are not entitled to any inspection of the inventory but if there is anything there it should be focused on what took place in this colloquy during the trial.

Mr. Anolik: Your Honor, may I most respectfully point out that your Honor's ruling was necessarily predicated upon the assumption of the verity of certain representations or lack of representations which should have been made. I think implicit in your Honor's direction that Mr. Germaise be permitted to go to this room was that he could look at any file he wanted to, and if he did not find the particular document there—there wasn't any direction by your Honor that he should only look for one item; he was to make a general inspection, so I think implicit in your Honor's ruling is that he should have been permitted to look for whatever he wanted. But with respect to these particular items, had he had the inventory he might even have found something of a completely exculpatory nature, and I inquire now, your Honor, why the United States Attorney should be so loath to produce this document, particularly as they pointed out the last time that they seemed to be treating it as some sort of sacred cow—I just cannot understand that, your Honor. I would think the United

States Attorney's office would be only too happy to make a disclosure of an item which they previously denied existed.

Mr. Mitchell: The United States Attorney's office is not treating this as a sacred cow, and we did not deny it existed. This is not a classic inventory in the sense of being a year-by-year or document-by-document recitation of everything that is in the files. In Judge Herlands' opinion in the Birrell case it was pointed out that such an inventory would probably take 100,000 hours to produce.

We are just saying that Granello and Levine have had no interest in these files and certainly your Honor wasn't allowing Mr. Germaise to go through 50 file cabinets to find what he wanted. I would like to point out, Judge Dimock, something that is interesting, and that is as of this moment Lowell Birrell hasn't established his ownership to any of these papers. The rights of many other people are involved, including the trustee. I am sure your Honor wasn't allowing him to go through every single paper in 50 file cabinets. It should be focused on these two items, and I say it should be limited to those two items for legal reasons.

Mr. Germaise: May it please your Honor, for instance, I point to Exhibit 111, which was the alleged agreement between Birrell, Granello and Levine and was broken down—one was Pacheco, the other Lomega or Oriental Park. This was supposed to define the rights of the parties and their duties and respective liabilities to each other. That came in on page 1235 of the record. Mr. Birrell stated—I believe it was in a sworn affidavit—

Mr. Mitchell: No.

Mr. Germaise: Wait a minute—that he personally told Mr. Stillman in the presence of Mr. Pinnell, his lawyer, Mr. Stim, his lawyer, and the two Internal Revenue agents attached to the case, Ferrise and Passarretti, that that Exhibit 111 did not accurately reflect the status of the par-

ties, that there was a subsequent agreement, another 111, and that was in his files.

I maintain, your Honor, that the government should have this other Exhibit 111 or so-called 111, that it shows the true nature of the transaction, that it contradicts the Exhibit 111 which the United States Attorney had introduced in evidence, and that it was kept hidden in the files, against the Brady v. Maryland doctrine, and I think if I had the inventory at the time Mr. Stillman denied its existence to your Honor, I would have found that document, I would have asked for its production and I would have presented it to the Court and jury, and I think it was the defendants' right to do that.

The Court: The United States Attorney did no more than to say that by implication assistance would be accorded to the defendants in locating, if possible, two classes of material which they had requested, and I am in a position now to enforce that, and that is what I propose to do; but the case is not going to retried, and there isn't going to be a motion for discovery for the purpose of Section 2255 or anything of that kind. I am simply going to make sure that the defendants be accorded that which they were entitled to inspect when the United States Attorney spoke about permission to enter the room where the papers were kept, and I believe I recall pretty generally his offer of assistance. But, at any rate, what I am going to do is to have the inventory examined by the government and have the government say whether there is anything in there which indicates the location of the ledger and the checkbooks; then I will check over what the government has said, and if there is nothing there, that is the end of it. If there is something there, what is there will be disclosed to the defendants.

Mr. Anolik: Your Honor, would that not be inconsistent with Jencks, the type of inspection which I think is what we would have been entitled to at the trial? Would your

Honor at least review the inventory to see whether there might have been something exculpatory within the purview of Brady v. Maryland? Because if there would be it might have—

The Court: No, I do not think the inventory is a statement made by any witness in the case.

Mr. Anolik: I do not know that it is, because I haven't seen it.

The Court: There isn't any charge here.

Mr. Anolik: No, but I say what if it contains statements—let us say one item of the inventory is a statement of so-and-so; it might be significant to that extent, your Honor.

The Court: That is what I would call a general discovery and I think it is too late for that, and I do not think you are entitled to it. The fact is, it was pretty well refused during the trial.

Mr. Anolik: I do not know that it was. I think your Honor strove to be as fair as possible during the trial, and I think had your Honor known about the inventory I feel that your Honor would probably—I mean this as only a conjecture, naturally—have directed at least that it be perused by defense counsel for the purpose of determining whether some of these items which were adverted to on page 6 of the record and elsewhere might be uncovered because the plethora of records here are such, your Honor, that they might very well contain matters which would have been a sine qua non to a successful defense.

I have spoken, naturally, to the defendants here—Mr. Direnzo, and I am sure Mr. Germaise, we have spoken with the consent of his attorney, of course, to Lowell Birrell, and they all indicated that there were items which probably would be mentioned in the inventory which would be of an exculpatory nature. Of course I have not seen them and I can only go by what was said. I realize I am repeating

hearsay but I certainly think, in view of the fact that there was, shall I say, either a grossly negligent or a deliberate suppression of this inventory during the trial that it imposes upon the government perhaps a greater obligation to afford us an intelligent review of that now, because without for a general discovery or to retry the case—we are not asking for that, but we certainly feel it is within the purview of 2255 to prevent unfairness, to prevent a deprivation of Constitutional rights, and in that spirit, your Honor, we feel that we should be entitled to at least a review of the inventory—I mean of the inventory itself. I am not talking about a review of all the records, your Honor, but the items in the inventory should not be that esoteric as to be denied to us, your Honor.

The Court: The only use of the inventory that I would have permitted if it had been disclosed at the trial is the use which I am permitting now.

Mr. Anolik: Thank you, your Honor.

Mr. Mitchell: Your Honor, I think it was Tuesday, when we were here last, that they requested the logs to be produced—the installation down in Florida.

The Court: Let us get through with this. Are you ready to say whether there is anything in the inventory about these things?

Mr. Mitchell: No, your Honor, not yet.

The Court: All right.

Mr. Mitchell: I meant now with respect to the Levine installation, so-called. Do you want to turn to that, Judge Dimock?

The Court: Yes. This is the—

Mr. Mitchell: Eavesdropping.

The Court: Yes. Go ahead.

Mr. Mitchell: May I have this marked as Court's Exhibit 1 for identification.

(Court's Exhibit 1 for identification.)

Minutes of Colloquy of December 11, 1967.

Mr. Mitchell: As your Honor recalls, last Tuesday the principal discussion concerned certain statements in the Solicitor General's brief on the direct appeal on this case, in which it was revealed that from May 11, 1962, until May 7, 1963, in a commercial establishment in Florida certain conversations of the co-defendant Levine were overheard. The Solicitor represented that logs of those conversations were available, and here are the logs.

Mr. Anolik: Your Honor—

Mr. Mitchell: May I just go on?

Mr. Anolik: Yes.

Mr. Mitchell: I have marked them, Judge Dimock, as Court's Exhibit 1 for identification. These are the entire logs from May 11, 1962, to May 7, 1963. I might say what they represent is each day's activity or non-activity at this commercial establishment. There may be one page for one day or ten pages for one day, and they are all in chronological order. This is marked Court's Exhibit 1 for identification.

Now would you please mark this as Court's Exhibit 2 for identification.

(Marked Court's Exhibit 2 for identification.)

Mr. Mitchell: Your Honor, Court's Exhibit 2 for identification are the logs for those days from May 11, 1962, to May 7, 1963, which are completely irrelevant to this motion.

In other words, the co-defendant Levine whose conversations are not reflected on these days or there was just simply nothing heard that day. Your Honor from a perusal of the logs can understand why the government proposes not to turn these over. There is absolutely nothing relating to either of the defendants in these pages of the logs.

That is Court's Exhibit 2 for identification.

I have prepared, Judge Dimock, for your help a sheet which reflects those days in which no portions of the logs are going to be turned over.

Now will you please mark this as Court's Exhibit 3 for identification.

The Court: What is the whole period?

Mr. Mitchell: May 11, 1962, until May 7, 1963.

The Court: Thank you.

Mr. Mitchell: Will you please mark this as Court's Exhibit 3 for identification.

(Marked Court's Exhibit 3 for identification.)

Mr. Mitchell: Would you please mark this Court's Exhibit 4 for identification.

(Marked Court's Exhibit 4 for identification.)

Mr. Mitchell: Now, Judge Dimock, Court's Exhibit 3 for identification are those days of the logs which we propose to turn over to the defense. However, on certain days portions of the logs we say should not be turned over, because again they do not relate to Mr. Levine. What I have done, Judge Dimock—I hope I am making myself clear—say there are eight pages for a particular log. Those pages of that log which we say should not be turned over to the defense are marked in red on your Honor's copy, and I might say the first page of the June 16, 1962, log is crossed in red, which mean that the defense has not received that page of the log.

Court's Exhibit 4, which is a fairly weighty document, are all those pages relating to all those days in which we are turning over materials to the defense. Again I have made—

The Court: I haven't got that straight yet.

Mr. Mitchell: It is just like a typical Jencks—

The Court: Wait a minute. Court's Exhibit 3 for identification goes to the Court.

Mr. Mitchell: Right.

The Court: And that contains all that you are willing to turn over to the defendants plus the completion of the time during which the logs were taken, and when you get to Court's Exhibit 4 for identification, that is for the defendants only, and that consists of Exhibit 3 minus what you are unwilling to turn over?

Mr. Mitchell: Correct, Judge Dimock.

Now let me, perhaps if I can clarify this, let us stay there are ten days involved here, Judge Dimock, as an example. There are five days in which we propose to turn over nothing to the defense relating to those five days. Each of those days, Judge Dimock, is in Court's Exhibit 2 for identification. Now there are five other days, let us say, in which three days we propose to turn over the entire logs—that is part of Court's Exhibit 3 for identification. The final two days, let us say, we propose to turn over half of the two days—that is also in Court's Exhibit 3 for identification.

What is in Court's Exhibit 4 for identification for the defense is that half of those two days that we propose to turn over.

Have I made myself clear, Judge Dimock?

The Court: Yes.

Mr. Mitchell: And may I say, with respect to Court's Exhibit 2, I have made an outline reflecting what dates are reflected there.

With respect to Court's Exhibit 3 for identification, I have made an outline with respect to that, to show which dates are reflected in Court's Exhibit 3, and what portions of each day we are turning over to the defense.

I might point out that in Court's Exhibit 1 for identification there are no markings or anything on it; it is the entire log.

The Court: And I get Court's Exhibits 1, 2 and 3 for identification; the defendants get Exhibit 4 for identification.

Mr. Mitchell: Correct.

The Court: Unless I give them more.

Mr. Mitchell: That is right. I think we might have to adjourn and then your Honor would rule on that.

The Court: I think so.

Mr. Mitchell: Now with respect to Court's Exhibit 4 for identification, I pointed out on Tuesday that I think there should be an order directing counsel that the contents of these documents cannot be revealed to anyone other than within the scope of this case, and Mr. Anolik and Mr. Direnzo said fine, they would abide by that but they wanted Mr. Germaise also to look at those.

Mr. Direnzo: And Mr. Klein.

Mr. Mitchell: Mr. Germaise is here.

Mr. Direnzo: I so stipulate.

Mr. Mitchell: I am just wondering with respect to Mr. Klein if he can file something and he is aware of your Honor's order and will not reveal anything.

The Court: There will be no difficulty about that, will there?

Mr. Direnzo: No, I do not think there will be any difficulty about that at all except I would like the representation from the United States Attorney that with reference to those portions of the transcript logs that are not being delivered over to counsel, that they make no reference to either Granello, Levine, Mr. Germaise or Mr. Klein, their attorneys.

Mr. Mitchell: Mr. Germaise and Mr. Klein—certainly Mr. Germaise and Mr. Klein, and certainly Mr. Granello, as I recall.

I have made my decision as to what I think should be turned over. I can assure you that if Mr. Levine was there at any time, it is right here (indicating).

Mr. Direnzo: And with one other addition, that no reference in any of the transcripts that are not being turned over to us, makes no reference to any witness that was called in this case.

Mr. Mitchell: I am not going to make any affirmations to that effect. I turned over what I think should be turned over.

There is a lot of material here to peruse, and I think you should look at it and Judge Dimock can pass on my ruling.

Mr. Direnzo: Then, if your Honor please, under these circumstances we of necessity must make an observation. Mr. Mitchell is going to examine these documents, as he has. Now he may in complete fairness feel that there are areas that we should not have but we might be in a far better position to evaluate the substance of these transcripts with reference to witnesses who might have been called who were not called, to determine whether or not anything was done by way of eavesdropping or otherwise that might have impaired the defense of either one of these two defendants.

One of the incidents that I have in mind—and your Honor must recognize, of course, that I did not try this case, nor did Mr. Anolik, the Germaise affidavit makes specific reference to a witness who had apparently been spoken to by Mr. Levine—I understand there were two witnesses—and that within a very short time—this was during preparation for the trial or at the trial—when a telephone call had been made to these witnesses, within a very short time after the call had been consummated these witnesses were contacted, I am made to understand, by an Agent Lopez.

Now it seems more than coincidental that of all of the residents in Cuba or Florida wherever these two witnesses were located at that time, that an agent of the United States Government should contact these two particular witnesses. Thus we find from a conversation that Mr. Germaise tells us he had with this Dr. Bustow that Lopez gave him very, very explicit instructions as to what he should or should not say.

As a matter of fact, he tells me also that you will find some evidence of that in the record from the very lips of the witness Dr. Bustow.

Now if there is anything in this area that is not being made available to us, the only evidence—the only legal reason I can give to your Honor is the one that was urged by Judge Fuld in the Court of Appeals in the Rosario case where they abrogated the old Walsh rule. In that instance the Judge would examine the document and if the document satisfied him that counsel was entitled to view the contents of that document, he said, "You are entitled to so much of it," or, "You are entitled to none of it," or, "A portion of it."

Judge Fuld held that that was not the proper way to do it. He said, "Nobody better knows the value of any document, any paper, any bit of evidence, than the attorney and client himself. He can better evaluate what he sees in a document far better than the Judge himself can." As a matter of fact, he cited the Jencks case and the Jencks Act in that very decision, and I state for that reason—and I have complete confidence in Mr. Mitchell—I know that when he makes available to us that which he thinks we are entitled to, he is honest about it—there is no question about that, but he might be mistaken. We might discern something or discover something that might be germane to our defense. There might be something exculpatory, and I think for that reason all of the logs should be made available to us.

And I will go further, your Honor, I am not completely satisfied with just receiving the transcripts because I have seen too many transcripts—I have been in too many trials where the transcripts did not accurately reflect the spoken word on a tape. There might have been a misunderstanding, an honest misunderstanding where one word was put down or there might be an inflection in the voice that might

give the meaning expressed that appears on the paper a different connotation entirely.

I think the original tapes should be made available to us so that we can hear them, and if we find that something appears on a transcript to be inaudible or not recorded, we would want to know two things:

1. Was it in fact inaudible? And

2. Was it in fact recorded?

They might not have recorded it in that transcript. It might have been recorded somewhere else in their own personal notes. Who knows but that might not be guilty of expoliation. We do not know, but I think in the concept of fundamental fairness and consonant with the rule enunciated in Jencks and Rosario, these tapes and all of the transcripts should be made available to us for us to evaluate, because they might be far more meaningful to us than even to the Court, and I have complete confidence in this Court.

For those reasons I feel all that should be given to us as they are.

Mr. Anolik: Your Honor, may I state that Judge Choate of the Florida District Court directed that the actual tapes be turned over, and I also point out in the Schipani case, in the United States Supreme Court, even a collateral reference was held material, and I think to that extent we would be deprived of a full review. We would be getting an attenuated, very narrow view of what these records contain, your Honor—because I understand, from what I am told by Mr. Levine, whose counsel, I believe, saw some of these logs in Florida—isn't that right, Mr. Mitchell?

Mr. Mitchell: That is right.

Mr. Anolik: That there are several places where they say "Not recorded" or "Inaudible" or things of that sort, and I certainly think it would be germane and obvious

when a respected coordinate judge, Judge Choate in Florida, held that the actual tapes should be made available.

The Court: Mr. Mitchell, is there any difficulty about making available the actual tapes of the matter which you now say you are willing to turn over in transcript form?

Mr. Mitchell: My understanding is that the tapes are no longer in existence.

The Court: That settles that.

Mr. Mitchell: Let me say this, if I am told otherwise I will, of course, inform the Court, but I understand they are no longer in existence and that these are the complete transcripts of those tapes.

As far as the other arguments, your Honor will pass on my rulings, and I still submit at this point they should get what I propose to give them—and I am sure they will spend enough time on this until we meet again.

Mr Direnzo: If your Honor please, if I may supplement the argument I previously made. It has been the consistent practice, I know in the State Courts, where under 813(a) they are entitled under wiretap orders, where transcripts were made, for counsel and the prosecution and the District Attorney's office investigators to go to a room where these tapes would be played, and transcripts would be made available to both sides. We would each hear what appeared on the original tape to determine whether we were in accord as to the accuracy of the tape.

Now the only reason we by-passed the tape itself in the trial—and in many instances we had them at the trial—the only reason why we did it was to make it a little bit more expeditious in the trial of the case because sometimes you had as many as one hundred or more tapes, it would definitely bog down the trial, if you had to hear all of these tapes, and it is only where we had questionable tapes that the tapes were actually played in the presence of the Court and the jury.

Now do I understand if they cannot produce the tapes we are bound by what is found in these transcripts? If they used the tape and it constituted illegal monitoring, I submit if they cannot produce the tape this entire proceeding, the entire government's case I say is polluted, and if it is polluted I say this conviction must be set aside.

I do not think we should be bound by tapes that we never heard.

Now definitely, as Judge Choate said at one point, where we were on motions, we take their word for it and that is all there is—we have the right to see these tapes either way at that trial, and this was legally producible, wouldn't it be a proper objection for counsel to say, "I object to it on the ground that it is not the best evidence"? And he would have to give a very good reason for not having the original tapes.

Why don't they have them? They locked them up in Mr. Hogan's office. They have special file cabinets, a special room, a special safe with one custodian. Nobody can touch them.

Now I am sure the government has adequate accommodations to do that which the District Attorney of New York County does, Kings County, Queens County, Bronx and Richmond. Why should it be any different with the government?

The Court: You are arguing for the principle that in all criminal cases where there were any government tapes, any eavesdropping or anything of that kind, that should be perpetually maintained.

Mr. Direnzo: Definitely, definitely, your Honor. If they just destroy them—if I may ask this question, maybe it seems silly, but why would they destroy the tapes? Would they say for economic purposes that they wanted to reuse the tape? That I don't even think the government would dare say.

These things should be absolutely protected. How else can a defendant defend himself—rely on a transcript? We have to trust the agents who heard it who are definitely partisan?

Mr. Anolik: Your Honor, I may add that the Appellate procedure here came to a conclusion just within the last couple of months—three months. I mean, so soon to destroy the tapes seems inconceivable.

The Court: Of course you do not have to look at the transcripts if you do not rely on them, if you do not want them.

Mr. Direnzo: I would never yield the right to look at the transcripts because they might still contribute something, but by the same token I do not want to yield the argument I have made to your Honor because I feel it is a valid and good and sufficient argument.

The Court: Would you consider that there is now before me a motion for a new trial on the ground that the tapes have been destroyed?

Mr. Direnzo: Yes, your Honor.

Mr. Anolik: Yes, your Honor, most assuredly.

Mr. Mitchell: If your Honor wants we can bring out the facts at a hearing relating to this, and I can marshal all the legal authorities in support of our position. This has been done before and has been passed on before.

The Court: I do not think that that is the point now—so as long as you would like to look at the transcripts you may look at the transcripts and act as you may be advised with respect to the absence of the tapes themselves.

Mr. Anolik: Would your Honor entertain a motion to amend our petition to include this?

The Court: I should think so, as long as there is plenty of time for the government to reply to it.

Mr. Anolik: Thank you, your Honor.

Mr. Mitchell: Now, Judge Dimock, with respect to Court's Exhibit 4 for identification, the documents which

we propose to turn over to the defense, the government makes two suggestions: one, that they either look at these in our room in the building here and not take it out of the building, or, two, if your Honor allows them to take it out of the building, that one of the attorneys be stipulated to keep exclusive possession of these. Because we do not want these lost and we do not want these misplaced and we do not want these to find their way into other people's hads, which is really consonant with the order that they should not reveal anything in these logs.

Mr. Direnzo: Or a copy.

Mr. Mitchell: Or no copies, Judge Dimock. I suggest first that they look at it in the building, or if your Honor does not want to do that, then one counsel be ordered to maintain exclusive possession.

The Court: And I assume you would like to have them in your possession?

Mr. Direnzo: Oh, definitely, your Honor. It would be too cumbersome otherwise. I do not care what attorney takes custodianship of it.

The Court: Just name anyone.

Mr. Direnzo: I will take them.

The Court: All right.

Mr. Direnzo: And nobody—they will not be removed from my office and nobody will make a copy of them.

Mr. Mitchell: And nobody will look at them other than yourself, Mr. Anolik and Mr. Germaise.

Mr. Anolik: And Mr. Klein.

Mr. Direnzo: Let me ask this, so there will be no question about it, what about Mr. Levine and Mr. Granello? They are the defendants. If Mr. Levine had a conversation, he is the best one qualified to testify as to the conversation.

The Court: I would certainly think so.

Mr. Mitchell: All right, then with the understanding that he is not to reveal the contents of this to any third party, it is to remain in the confines of this case.

Mr. Direnzo: I will be responsible for any lawyer but if you ask me to tell you that Mr. Levine will not say it to somebody else, that I cannot represent. How did we find out about the logs? Levine told us about it. That is how we came into this.

Mr. Mitchell: You were told about this in the Solicitor's brief in the Supreme Court.

Mr. Direnzo: Yes, but we also had an affidavit from him that he had—he is an interested party.

As to Granello, if I did not want to remove the transcript from my office and he is incarcerated, how else could I let him see it except to bring it over to the prison—unless your Honor will entertain an application to fix bail for him in the interim.

This is another cumbersome feature about it.

I do not think this is going to be resolved for some time, and I sincerely hope that your Honor could see fit at this time to entertain this application to fix bail on Granello. If we are right, your Honor, he should not be serving the sentence he is presently serving at this time.

Mr. Mitchell: The government opposes that and says that on the basis of these transcripts there will be no basis for relief in this case. The Solicitor would not have represented—

Mr. Direnzo: He is only serving a misdemeanor, your Honor—he is serving time for misdemeanors, your Honor.

The Court: It is a very difficult subject. There is an awful lot to be said for the position that lawyers have decisions made against them when they haven't had an opportunity to be heard at all, and about all that anybody can reply to that is, well, the records are marked for identification and are submitted to another bench of judges, the Appellate Court, and that sort of thing, and if the Court below who had heard the argument permits it, it is easy to say that it is just as unjust to have a decision by three judges who have not heard the lawyer as a decision of one

judge who heard the lawyer; but, at any rate, that is the best we can do, that you cannot disclose these things.

I am impressed with the fact that the courts have gone so far, just as in the Jencks material and that sort of thing, to let the lawyers see these things in the court, but I think I was impetuous in saying "Yes, if the man concerned is Granello he should be allowed to look at it."

I think that is part of the public policy in favor of secrecy of the government's records, which goes back to the investigation of criminal activity.

Mr. Mitchell, as long as these are only records which deal with Granello and Levine, what is the danger of disclosure to them? If they involved other activities, there might be some danger but—

Mr. Mitchell: Well, your Honor, to a certain extent of course they do involve other activities. If Mr. Levine wants to look at them, all I say is that he abide by the order that is being made to counsel, and that is that they not reveal it to other people.

Mr. Direnzo: He would be so apprised, there is no question about it.

The Court: But Mr. Direnzo—

Mr. Direnzo: I said I would be responsible.

The Court: To be perfectly realistic about it, I have no control over it.

Mr. Mitchell: I think your Honor could enter a lawful order that Mr. Levine is not to reveal it to other people, and if he did he would be subject to contempt of court. All I say is that Mr. Direnzo should have an affidavit prepared by Mr. Levine saying that he is aware of your order and that he will abide by it.

Mr. Direnzo: That I will do.

The Court: All right. It does not seem to be very effective but I think it certainly ought to be done.

Mr. Anolik: It is an in terrorum device, if nothing else, your Honor.

The Court: All right, orders of that sort will be prepared.

Mr. Direnzo: We will prepare that order.

The Court: I think if it is something the government wants, it ought to prepare it.

Mr. Mitchell: I am not going to be seeing him.

The Court: Just prepare the order and submit it to Mr. Direnzo.

Mr. Direnzo: You prepare the order.

Mr. Mitchell: All right.

Mr. Direnzo: Is it understood that Mr. Granello can or cannot see these transcripts, your Honor?

The Court: Can under these circumstances, under this special order.

Mr. Direnzo: And that will be at the prison if he is there—

The Court: Yes.

Mr. Direnzo: —unless your Honor decides to grant bail.

The Court: That is right—wait a minute. That involves taking the papers from here to the prison.

Mr. Direnzo: That is right.

Mr. Mitchell: If Mr. Direnzo wants to take a pleasant ride up to Danbury himself—

Mr. Direnzo: What a pleasant ride?

Mr. Mitchell: —and show it to him but keep it in his possession all the time.

Mr. Direnzo: That is one of the disadvantages of not having the defendant available on bail.

Again the lawyer is being penalized, your Honor. As I pointed out before, your Honor, if we should ultimately prevail, the defendant should not be in jail.

The Court: I will give you a very quick decision on this matter, and if there is any feature of it which requires extension of time, the expending of the time, my ears are always open.

Mr. Direnzo: All right, Judge.

Mr. Mitchell: Just with respect to this order which I am going to prepare, Judge Dimock, this order should cover all counsel and both defendants? Does your Honor want to sign the order?

The Court: I will sign it this afternoon.

Mr. Mitchell: All right, thank you, Judge Dimock.

Now I do have all of these documents here—oh, one thing for clarification, Judge Dimock, for the defense and for yourself—the defense was made aware of this down in Florida. There is a Hyman Levine and there is a George Levine reflected on these logs. "H. L." usually refers to Hyman Levine, and "G. L." usually refers to George Levine.

When you read the transcripts you will realize that the Levine is the George Levine who is involved here. There is no doubt about that because his conversation with his other attorneys in the other case were reflected, and they were under the abbreviation "G. L."

"H. L.," Hyman Levine, is an entirely different person, and that has been gone through down in Florida. Although his name appears "Hyman Levine also known as George Levine," the "George Levine" on these logs is our George Levine in this case, and "Hyman Levine" is an entirely separate person.

The Court: I do not suppose that can be confirmed by counsel on the other side because they have never seen it.

Mr. Mitchell: When they see the transcripts they will realize the "G. L." is George Levine, and Hyman Levine also known as George Levine, but you will see when "G. L." is speaking in certain respects you know that is the George Levine involved in this case because of his prior troubles.

The Court: For present purposes you are telling us that as far as the government is concerned—

Mr. Mitchell: Right.

The Court: —the Hyman Levine up here is something entirely different from those?

Mr. Mitchell: That is right.

The Court: You are just warning us about that.

Mr. Mitchell: Right.

Mr. Anolik: Your Honor, just to avoid misunderstanding, do I understand we are at liberty with your Honor's permission to make a supplementary or amending motion with respect to the destruction of the tapes so as to consolidate that with our 2255?

The Court: That is right.

Mr. Anolik: And we will give the government due notice of that?

The Court: Yes.

Mr. Anolik: Thank you, your Honor. We will adjourn without date now, your Honor?

The Court: Yes, subject to renewal by notice.

Mr. Mitchell: Thank you, Judge.

Mr. Direnzo: Thank you, your Honor.

Mr. Anolik: Thank you, Judge.

The Court: When are these things going to be turned over to me?

Mr. Mitchell: They are right here, Judge Dimock (indicating).

The Court: All right. Does this include the so-called inventory?

Mr. Mitchell: No, your Honor. I though I would persue it first.

The Court: You are not through with that.

Mr. Mitchell: No.

(Adjourned sine die.)

Preliminary Decision of Dimock, D. J.

MEMORANDUM

DIMOCK, D. J.

This is an application under Title 28, Section 2255 of the United States Code, to set aside a judgment convicting defendant Salvatore Granello on two counts of failing to file Federal income tax returns.

Three principal grounds for the application are assigned:

1. Documentary evidence used in the trial was taken by trespass from one Birrell who had been acting as attorney for defendant Granello.

2. That a certain inventory of the Birrell documents was not made available at the trial to assist defendants to locate the desired papers.

3. The Government was in possession of a tape recording obtained by trespass upon premises in which a co-defendant Levine had an interest.

1. As announced on the argument, I have rejected the claim that Birrell acted as defendants' attorney. The case was tried before me and it was evident that the relations between defendants and Birrell, far from seeming that of clients and attorney, were even more distant than arms length.

2. I have, however, directed the Government to use the inventory and report whether the material desired by defendants is disclosed thereby as being within the Government's possession. This ruling is based upon the fact that the Government, while in possession of the inventory, led the court to believe that every assistance would be afforded to defendants in their search for the desired

material, to wit, a certain ledger of the law firm of Birrell & Larsen, and certain check books. If the Government reports that this material is not listed on the inventory, the inventory will be checked by the court and preserved for possible appellate review.

3. There remains the matter of the tape recording.

The Government, for use in other unrelated prosecutions of defendant George Levine, maintained a listening device in premises in Miami, Florida, from May 11, 1962 to May 7, 1963. An abortive trial of the instant case took place beginning September 28, 1964, and, after a mistrial, the trial in which the conviction was had was commenced on April 5, 1965. The conviction was affirmed by the Court of Appeals, United States v. Granello, 365 F. 2d 990, 2 Cir., 1966. On certiorari to the Supreme Court the application was denied (386 U. S. 1019) but the Chief Justice and Mr. Justice Douglas concurred in a dissenting opinion by Mr. Justice Fortas in which Mr. Justice Fortas expressed the view that certiorari should be granted and the case remanded for hearing in the District Court with respect to the electronic surveillance which the Solicitor General had revealed in his brief to the Court.

I can do no better than to quote the rest of the opinion of Mr. Justice Fortas.

> "According to the Solicitor General, agents of the Federal Bureau of Investigation on or about May 11, 1962, surreptitiously and by trespass installed an electronic listening device in a 'commercial establishment in Florida owned by an acquaintance of petitioner Levine and in which Levine may have had a proprietary interest.' The device was in operation for nearly one year. During that time a number of conversations in which Levine participated were overheard. Some of those conversations were between Levine and at-

torneys representing him in prosecutions for interstate transport of counterfeit securities and for stock and mail fraud, matters then pending in a federal court in Florida.

"The Solicitor General represents that this violation of petitioner Levine's constitutional rights had no connection with the present case, which involves a prosecution in New York for failure to file income tax returns for 1956 and 1957. He says that it originated in connection with an FBI investigation relating to the charges for which petitioner Levine was tried and convicted in Florida. See *Rogers* v. *United States,* 334 F. 2d 83 (C. A. 5th Cir.), cert. denied, *sub nom. Levine* v. *United States,* 380 U. S. 915; *Gradsky* v. *United States,* 342 F. 2d 147 (C. A. 5th Cir.), vacated and remanded *sub nom. Levine* v. *United States,* 383 U. S. 265. The Government represents that nothing was overheard which had anything to do with the present criminal tax case, and that neither the Internal Revenue Service nor prosecuting counsel was apprised of the existence of the surveillance. The Solicitor General says that petitioner Levine will be furnished with the logs so that he may take whatever action is appropriate in the District Court in Florida relating to the convictions obtained in that court.

"It is entirely possible, perhaps even probable, that the Solicitor General's representations will be validated, and it may be that no reason will be developed for invalidating the present convictions because of the trespassory espionage or its fruits. But this is 'dirty business.' *Olmstead* v. *United States,* 277 U. S. 438, 470 (1928) (dissenting opinion of Mr. Justice Holmes). It is important enough for the Solicitor General to call to our attention. And an appraisal of the material and the circumstances by defense counsel may

> adduce facts affecting the weight to be given the unlawful operation which would never occur to the prosecutor. The prosecutorial eye is, after all, apt to yield an out-of-focus picture, as is the eye of the defense. But in our system we insist upon the perspective developed by both. See *Dennis* v. *United States,* 384 U. S. 855, 875 (1966). In any event, the facts, circumstances, yield, and friuts of the electronic surveillance should be exposed to the record of this case so that we may, at least, be sure that the Government's trespassory surveillance has not infected the trial of these petitioners."

The papers upon this application make the same charge with respect to the electronic surveillance as motivated the three dissenting justices, to wit, that the listening device was insalled by trespass in an establishment in Florida owned by an acquaintance of petitioner Levine and in which Levine "may have had a proprietary interest." It is also to be noted that the three dissenting justices did not limit to Levine the effect of possible violation of Levine's constitutional rights by the electronic surveillance of premises in which he had an interest.* Justice Fortas said that investigation should be made so that it could be made sure that the surveillance had not infected the trial "of these petitioners".

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* Incidentally, counsel for the Government advises that defendant Levine's conviction in the case in preparation for which the electronic surveillance was used was set aside on account of the violation of his constitutional rights after he had served more than two years of his twelve year sentence. In the instant case he had been sentenced to serve two years consecutively to the twelve year sentence so that his service of the first two years of the invalid twelve year sentence was accepted as service of the sentence in the present case. That may explain the fact that no similar application on his behalf is before me.

If it were Levine who was making this application there would be an open question as to whether he really had an interest in the premises where the device was installed. The present applicant Granello is even further removed from the effect of the trespass. It is correctly asserted that Granello's conviction was grounded upon the fact that he and Levine were engaged in a joint venture in committing the acts constituting the crime of which they were convicted. It is argued that, since they were engaged in such a joint venture, Granello can take advantage of any illegality in the seizure of material as a co-adventurer, despite the principle that B cannot take advantage of the violation of A's constitutional protection against search and seizure that was the basis of the holding in this very case that Granello could not take advantage of the illegality of the seizure of Birrell's papers, United States v. Granello, 365 F. 2d 990, 995-6, 2 Cir., 1966.

At this stage of the proceedings, the only matter before me is the right of defendant Granello to see the product of the listening device. As remarked by the three dissenting justices, the surveillance was a dirty business and I am not disposed to attack with much enthusiasm the theories on which Granello may be given the material necessary for him to present the question whether that dirty business has infected his conviction. While I realize, therefore, that the views of the dissenting justices do not represent the view of the Supreme Court, I feel that their opinion justifies me in at least allowing an examination of the material obtained by eavesdropping.

I have therefore directed that a transcript of the recording be submitted to the court by the Government. I have ruled that parts of the taped conversations that did not relate to, or could not furnish leads with respect to, the instant case need not be disclosed. As a result of these directions a large bulk of material has already been turned

over to counsel for defendant Granello. The Government's touchstone for identifying the material to which Levine would have been entitled has been whether Levine was a participant in the conversation recorded by the device. That is not liberal enough. Statements made by someone within the instrument's hearing about Levine, while they might be hearsay and thus inadmissible, might, nevertheless, furnish leads that could be used against him on the trial. On the working hypothesis that Granello's rights are the same, defendant Granello should be allowed to examine so much of the transcript as contains any statement picked up where Levine was a participant or where it dealt with Levine.

I have examined the transcript that was the entire product of the device for almost a year and I concur in the separation proposed by the Government between the supplied and withheld material except in so far as the Government does not propose to turn over the hearsay references to Levine. I have prepared a list of those hearsay references and annex them as Schedule A. In so far as the Government fears that the disclosure of these references to hearsay will disclose irrelevant matters, the subject can be taken up with me for the purpose of attempting to exclude the irrelevent material without affecting any usefullness that it may have on defendant's application.

The decision of the application under Section 2255 in so far as based upon the failure to use the inventory and the use of the electronic surveillance is held in abeyance pending the examinations hereinabove provided for.

The application in so far as based upon other grounds is denied as frivolous in view of earlier rulings of the court.

Dated: December , 1967.

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United States District Judge.

SCHEDULE A

References to George Levine in excised material—
From Ex. 2 id.

DATE	TIME
6/11/62	12:40 pm
6/15	10:25 am
"	2:32 pm
"	3:12 pm
6/21	2:04 pm
6/22	2:36 pm
6/25	12:29 pm
"	3:02 pm
"	4:07 pm
6/27	10:40 am
"	10:50 am
6/28	9:53 am
"	10:18 am
7/6	10:13 am
7/7	12:06 pm
7/9	10:08 am
"	10:27 am
7/17	11:31 am
"	3:49 pm
"	4:10 pm
7/18	3:15 pm
7/20	2:50 pm
9/11	11:44 am
"	1:40 pm
9/15	10:14 pm
10/14	12:04 pm
10/19	5:52 pm
"	6:00 pm
10/22	10:22 am
"	7:01 pm
10/23	11:41 am
11/5	11:15 am
11/12	9:48 pm
11/13	12:12 pm
11/15	5:15 pm
2/26/63	1:47 pm
2/27	1:45 pm

SCHEDULE A

References to George Levine in excised material—
From Ex. 3 id.

DATE	TIME
6/16/62	11:26 am
6/30	11:41 am
7/2	3:42 pm
7/4	5:31 pm
"	5:40 pm
7/23	12:47 pm
"	3:25 pm
"	3:30 pm
"	4:14 pm
7/26	11:40 am
8/21	8:55 am
"	10:57 am
"	12:24 pm
"	12:30 pm
"	12:47 pm
"	5:01 pm
8/25	4:06 pm
9/2	1:17 pm
9/7	8:55 pm
10/4	11:15 am
"	11:32 am

Order Final Decision of Dimock, D. J., Appealed From.

OPINION

DIMOCK, D. J.

This is a motion by defendant Granello for a vacation of a judgment of conviction and a vacation of the indictment or, at the least, a new trial. The motion is made under Title 28, Section 2255, of the United States Code, and is based on four grounds, the first of which is that material obtained by violation of his constitutional rights has been used against him and the second of which is that the tape recording produced by a listening device that was used has been destroyed* so that all that is presented to the court is a log purporting to be the transcription. The Government has conceded that a tape recording of conversations was obtained by a mechanical listening device inserted by trespass on premises in which Granello's co-defendant Levine is said to have had a proprietary interest and which seem to have been used as a bail bond office.

By a memorandum dated December 14, 1967, I directed the Government to permit examination by Granello of three categories of material, all parts of the log concerning (1) him, (2) his co-defendant Levine, or (3) the handling of the trial of this case. This was accomplished by having the Government first peruse the logs and delete material that was not to be turned over. I then reviewed the complete log to make sure that all required material would be turned over. All of the material within the direction was turned over to Granello. The name "Granello" appeared

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* While the word used in the record is "destruction" there was no evidence that it meant more than that the recording of the sounds has been removed as is customarily done by the users of tape recorders who wish to reuse tape.

several times in the transcript but never in a context that indicated any connection with the instant case. Nevertheless the transcripts turned over to Granello included all parts thereof where his name was mentioned. All portions dealing with Levine were also turned over, though none of these indicated any connection with the instant case, either. No material in the third category was found.

The December 14 memorandum stated my views upon the third and fourth grounds on which the instant motion is based. The third ground was that documentary evidence used in the trial was taken by trespass from one Birrell who had allegedly been acting as attorney for defendant Granello. I had announced on the argument that I rejected the ground on the basis of the facts of the case as I had learned them when it was tried before me. In the memorandum I stated my views on a fourth ground for the motion i.e., that a certain inventory of the Birrell documents was not made available at the trial to assist the defendant to locate certain desired papers. I directed that the Government use the inventory in the search. The Government, at my direction, has made available to defendant Granello the only material that he desired to reach by the use of the inventory and no further application has been based thereon so that this issue is eliminated.

I reached the decision to permit the above described examination of the transcript, not because Granello showed any legal right or likelihood that anything turned up by the illegal monitoring would prove to be connected with his conviction so as to warrant a full scale investigation, but only because it seemed fair that he should be permitted to satisfy himself. This position was reenforced by the fact that the Solicitor General had already disclosed the log to Granello's co-defendant Levine. See Mr. Justice Fortas' dissenting opinion on an unsuccessful application for certiorari in the instant case, 386 U. S. 1019 (1967).

Levine was shown portions of the log in Florida in connection with a separate case there.

After reviewing the logs turned over to him Granello does not contend that anything contained therein was used against him in his trial either directly or as a lead. Moreover, while he has not abandoned the application for examination of the entire transcript, he makes no present contention that any material concerning him in the transcript before me has not been turned over.

What Granello now says is that the transcript presented to this court by the Government is incomplete and, since the tapes have been destroyed and cannot be checked, he should be allowed preliminarily to examine those who conducted the unlawful surveillance to uncover material that might lead to dismissal of his indictment or to a new trial. He seeks disclosure of anything concerning him that was overhead but not recorded, or recorded but not transcribed.

In support of this charge of incompleteness Granello submitted an affidavit of his co-defendant Levine to the effect that when he saw the logs in Florida they appeared to be more complete than the logs that were shown to him in connection with the instant case. A supplemental affidavit of Levine's was submitted in which he quoted certain parts of the log that he had read in Florida and said that there were other references in the log to Granello but that he did not make note of them. All of the matter which Levine quoted was contained in full in the log that had been turned over to Granello. A possible explanation for the thought that the quotations were not included in the surrendered log is that they appear in the surrendered log under date of October 4, 1962, while in Levine's affidavit the quotations appear under date of November 4, 1962. Levine also made the conclusory statement that he found in the Florida log "conversations pertaining to"

the instant case, but gave no further details. Affidavits of two Florida lawyers in identical form with Levine's supplemental affidavit were submitted but their unsupported conclusions on whether the conversations pertained to the instant case are no more reliable than Levine's.

Even if Granello could conclusively show that the logs are incomplete, however, he could not prevail on this application. The basis of this application is the illegal monitoring of premises in which defendant Levine had an interest. Levine does not join in the application. The application is made by his co-defendant Granello who says that since the monitoring was unlawful as to Levine, he, as Levine's co-defendant, is entitled to all the relief to which Levine would have been entitled, including the right of examination of those who conducted the monitoring and prepared the transcript.

From the time of the decision in Wong Sun v. United States, 371 U. S. 471 (1963) up to the time of the order of the United States Supreme Court in Kolod v. United States, 36 L. W. 3306 (1/30/68), it was clear that to obtain relief where there had been an unlawful search, the search must have been unlawful as to the applicant.** That being so, the fact that the applicant might show that the one whose personal rights were violated was his agent or a co-defendant or engaged in a joint enterprise with him would make no difference. To put it concretely, in the instant case the monitoring must have occurred in a place where the applicant had a possessory or proprietary interest or, as expressed in Katz v. United States, 389 U.S. 347 (1967), was relying on privacy. There is no evidence of anything of the kind here. No claim is made that Granello ever set foot in the bail bond office or that he was the direct object of an electronic surveillance. So far as appears from the

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** See also an opinion in this litigation, United States v. Granello, 365 F. 2d 990, 2 Cir. (1966).

report of the Kolod order, however, where relief was afforded not only to Alderisio, the defendant whose place of business was monitored, but to Alderman, his co-defendant, the co-defendant had no more relationship with the other defendant's place of business than Granello had with Levine's place of business in the instant case. An examination of the record on which the Kolod order was made discloses no claim that the defendants differed in status and the point was not briefed. The record neither affirmed nor denied the co-defendant's reliance upon the defendant's premises for privacy and it may well be that the actual but undisclosed facts placed the co-defendant in the same position as the defendant owner of the property so clearly that the Government felt it useless to raise the point.*** Whatever may be the cause of the omission, I cannot accept an order of the Court made on such a meager record as overturning principles previously announced after careful consideration.

The foregoing treatment of Granello's application has been limited to discussion of his claim of the right to examination and investigation. This claim of the right to examination and investigation is preliminary to a claim for a new trial or dismissal of the indictment which would

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*** This surmise draws some support from the wording of the Solicitor General's statement quoted by the Court in its order in Kolod, 36 LW at 3307, that "[N]o overheard conversation in which any of the petitioners participated is arguably relevant to this prosecution." That language should be contrasted with the unequivocal statement of the Solicitor General in his Supreme Court brief in the instant case which has been submitted by the Government to me: "[W]e have conducted a review to determine whether any electronic eavesdropping or wiretapping affected the conviction of either of the petitioners. It appears from this that no conversations of petitioner Granello were overheard by any electronic surveillance; he was never the direct subject of an electronic surveillance nor did he engage in conversations held on other premises which were subject to such surveillance."

be based upon information disclosed by examination and investigation. Since the plea for examination and investigation is groundless, the plea for a new trial or a dismissal of the indictment, in so far as it would be based upon the fruits of the examination or investigation, is doubly groundless.

Granello's counsel has, however, argued that destruction of the tapes was per se such an egregious violation of fair play that, irrespective of any information that might be disclosed by examination or investigation, his conviction should be reversed forthwith. Clearly destruction of the tapes would harm an applicant if it prevented the applicant from proving that the Government had illegally seized evidence. It could be argued that in such circumstances an examination of the monitoring offices would be an inadequate remedy for if they chose to lie about what they overheard there would be no way of proving that illegally obtained evidence had been used against the applicant. Therefore counsel for Granello say that the Government ought to be penalized for destroying the evidence and suggest as a penalty reversal of Granello's conviction. This, of course, would involve disregard of the rule that illegality as to monitoring of a third person is immaterial. No relaxation of the rule that the illegality must be illegality toward the applicant would be appropriate, however. The Government's act in destroying the tapes and thus making it hard for the applicant to prove the alieged use of monitored evidence against him has no relationship to the illegality of the monitoring.

Thus, if any special penalty is to be imposed it must be with respect to proof of the obtaining and use of incriminating evidence. For example, it might be ruled that when tapes had been destroyed the burden would be upon the Government to prove that no evidence used against the applicant had been obtained. There would be no occasion

for deciding that issue, however, unless there had been a monitoring illegal as against the applicant. Since the monitoring here was not illegal as against the applicant we need not consider whether the destruction of the tapes would change the rules of proof of the obtaining and use of incriminating evidence. It is still enough to say that the monitoring was not illegal as to applicant and that therefore he has no right to an examination of those who took part in the monitoring and certainly none to a new trial or dismissal of the indictment.

The Court hereby denies the application for investigation and examination and the application under Title 28, Section 2255 of the United States Code, made under all of the grounds urged by pettitioner Granello, including, without limiting generality, the following:

1. Documentary evidence used in the trial was taken by trespass from one Birrell who had been acting as attorney for defendant Granello.

2. A certain inventory of the Birrell documents was not made available at the trial to assist defendant to locate the desired papers.

3. The Government was in possession of a tape recording obtained by trespass upon premises in which a co-defendant Levine had an interest.

4. The original tape recording has been destroyed.

Dated: March 7, 1968.

D. J. Dimock,
United States District Judge.

Opinion of Court of Appeals.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 44—September Term, 1968.

(Argued September 17, 1968 Decided October 18, 1968.)

Docket No. 32370

UNITED STATES OF AMERICA,

Appellee,

—v.—

SALVATORE GRANELLO, a/k/a SALLY BURNS,

Appellant.

FRIENDLY, *Circuit Judge:*

Salvatore Granello appeals from a denial by Judge Dimock in the District Court for the Southern District of New York, of an application under 28 U. S. C. § 2255 to vacate his conviction for failure to file income tax returns for 1956 and 1957, which we affirmed, 365 F. 2d 990 (1966), cert. denied, 386 U. S. 1019, rehearing denied, 387 U. S. 959 (1967).

On the basis of a letter from Lowell M. Birrell stating that his law firm, Birrell & Larson, "represented Salvatore Granello and George Levine in various matters during the period from 1954 through 1957" and "received many confidential papers and documents in their capacity as attorneys for Messrs. Granello and Levine," Granello seeks to renew the challenge to the use of material from the Birrell records that was rejected on his appeal. The

unsworn letter does not even claim that Birrell & Larson were acting as Granello's attorneys in the transaction here at issue and, as Judge Dimock held below, the trial record made "evident that the relations between defendants and Birrell, far from seeming that of clients and attorney, were even more distant than arms length." Moreover, the attorney-client privilege was one of the grounds for exclusion raised on appeal, and we rejected it in holding that the records were admissible against Granello. 365 F. 2d at 995-96. Except in extraordinary circumstances not here present, § 2255 may not "be employed to relitigate questions which were raised and considered on the appeal." *Castellana* v. *United States,* 378 F. 2d 231, 233 (2 Cir. 1967).

Granello's second point is that since at the time of the trial the Government had in its possession a 300-page inventory of the voluminous documents seized from Birrell, its failure to make this available to defense counsel denied fundamental fairness. We need not pass on the premise of this argument—that the prosecution has a duty to turn over not merely evidence known to it but its own work product in another case that would assist the defense—although this surely would be occupying new ground. The only items among the Birrell records in which Granello's trial counsel had indicated any interest were the law firm's general ledger and certain checkbooks. Before denying the application the court below directed the Assistant United States Attorney to see whether these were listed in the inventory; the prosecutor reported that the inventory was silent about the ledger and, at the judge's direction, made available to the defense the checkbooks that were discovered. Granello's counsel did not avail himself of the judge's offer to have the inventory checked by the court and made no further application on the basis of the materials he received. Furthermore, as our previous opinion shows, 365 F. 2d at 996-97, Granello's

former counsel in moving for a new trial availed himself of an indication from Birrell of what supposedly helpful information the files might contain.

Granello's third point is this: In his brief opposing the petition of Granello and Levine for certiorari, the Solicitor General disclosed that from May 1962 to May 1963 the Government had conducted electronic surveillance by a microphone installed through trespass in a commercial establishment in Florida in which Levine may have had a proprietary interest. The Solicitor General reported that no conversation of Granello had been overheard and that, with respect to Levine, the surveillance covered no conversations related to the instant case, nor to the years here involved, nor any conversations with his attorney in this case. The Supreme Court denied certiorari, three Justices dissenting on the basis that the prosecutor's conclusions should not be determinative and that "the facts, circumstances, yield, and fruits of the electronic surveillance should be exposed in the record of this case so that we may, at least, be sure that the Government's trespassory surveillance has not infected the trial of these petitioners." 386 U. S. 1020-21. Granello's § 2255 application sought to accomplish this. Without attempting to decide what kind of overheard conversations would entitle Granello to relief, the district court directed the Government to permit examination of all parts of the logs concerning Granello, Levine, or the handling of the trial. The judge reviewed the logs to make sure that his directions had been carried out; we likewise have done this and are similarly satisfied. Granello does not contend that the logs thus turned over contain anything that was used against him either directly or as a lead or that related to the trial.

Granello's complaint concerns the judge's denial of a defense request that, since the tapes had been destroyed, apparently in usual course for reuse, the Government be

required to produce for examination the agents who had conducted the surveillance. The request was supported by three affidavits from Levine. Two contained merely conclusory statements that the logs he had seen in Florida mentioned "conversations pertaining to" this case and that those logs were "more complete" than those he examined in New York. The third recited from the Florida logs three passages referring to Granello and said that there had been more. Affidavits of two Florida lawyers corroborated the third affidavit but added nothing to it. In fact the logs turned over to defense counsel did contain the cited passages although under a different date.

Judge Dimock denied the request because of the lack of any showing that the monitoring occurred in a place where Granello was "relying on privacy." The recent broadening of Fourth Amendment protection with respect to electronic surveillance, wrought particularly by *Katz* v. *United States,* 389 U. S. 347 (1967), will indeed raise new and difficult questions of "standing." As Judge Dimock noted, such a question seems to exist with respect to one of the defendants in *Alderman* v. *United States,* see 390 U. S. 136 and 392 U. S. 919 (1968), which will shortly be reargued in the Supreme Court, and the Court's decision may cast significant light upon this problem. While we do not disagree with the district court's views about standing, we thus prefer to rest our affirmance on the basis that, particularly in light of the Solicitor General's representation to the Supreme Court that "neither the existence of the surveillance nor any information overheard was communicated in any manner to the Internal Revenue Service or to government counsel who prosecuted this case," Granello did not raise a sufficient question concerning the incompleteness of the logs to require that the agents be called.

Affirmed.